

## **REMARKS/ARGUMENTS**

### **Interview Summary**

The examiner initiated a telephone interview with Applicant's legal representative, Jeffrey N. Cutler, on October 17, 2005. The examiner was inquiring as to whether a response had been filed to the election/restriction requirement mailed on April 14, 2005. Mr. Cutler has no record of such requirement having been mailed. In review of the records at the PTO, the examiner noted that the requirement had been inadvertently sent to prior counsel of record for the record owner of the present application. Accordingly, the present election/restriction requirement was resent with a new period for response set.

It is noted that while it is the common practice of the PTO to set a shortened statutory period of one (1) month for response in these actions, the present period for response has been set for three (3) months. Applicant has responded within this set period for response.

### **Summary of the Examiner's Actions**

The Examiner indicated that the present application contains claims directed to the following patentably distinct species of the claimed inventions:

Species I of Figures 1-6; and

Species II of Figures 7-11.

Accordingly, the examiner required applicant, under 35 U.S.C. 121, to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. The examiner indicated that no claim appears to be generic.

Applicants elect Species II, including claims 1-51. It is respectfully submitted that each of Claims 1-51 reads on the invention illustrated in Figures 7-11. Accordingly, no claims have been withdrawn or cancelled. It is respectfully submitted that at least the independent claims, Claims 1, 21 and 41 are each generic claims. Applicants make such election with traverse.

The MPEP is clear as to when an election requirement is and is not appropriate, and when appropriate, the requirements for making such election. It is respectfully submitted here that an election requirement is not appropriate. Further, if such a requirement were appropriate, it is respectfully submitted that the examiner has not met her burden for establishing such appropriateness.

## **MPEP §808.02**

MPEP §808.02 states in part:

Where, as disclosed in the application, the several inventions claimed are related, and such related inventions are not patentably distinct as claimed, restriction under 35 U.S.C. 121 is never proper (MPEP §806.05).

Where the related inventions as claimed are shown to be independent or distinct under the criteria of MPEP §806.05(c) - §806.06, the examiner, in order to establish reasons for insisting upon restriction, must explain why there would be a serious burden on the examiner if restriction is not required. Thus the examiner must show by appropriate explanation one of the following:

(A) Separate classification thereof: This shows that each invention has attained recognition in the art as a separate subject for inventive effort, and also a separate field of search. ...

(B) A separate status in the art when they are classifiable together: Even though they are classified together, each invention can be shown to have formed a separate subject for inventive effort when the examiner can show a recognition of separate inventive effort by inventors. ...

(C) A different field of search: Where it is necessary to search for one of the inventions in a manner that is not likely to result in finding art pertinent to the other invention(s) ...

Where, however, the classification is the same and the field of search is the same and there is no clear indication of separate future classification and

field of search, no reasons exist for dividing among independent or related inventions.

With respect to the present application, it is respectfully submitted that the claims vary only in scope. Each is directed to the same invention. Accordingly, there are not separate classifications for each species indicated by the examiner. Further, the various species indicated by the examiner do not form separate subjects for inventive effort by the inventors. Nor is it necessary to perform independent searches for each of the species designated. Accordingly, it is respectfully submitted that the election requirement is improper as set forth in MPEP §808.02.

### **MPEP §803**

MPEP §803 states:

Under the statute, the claims of an application may properly be required to be restricted to one of two or more claimed inventions only if they are able to support separate patents and they are either independent (MPEP §802.01, §806.06, and §808.01) or distinct (MPEP §806.05 - §806.05(j)). If the search and examination of all the claims in an application can be made without serious burden, the examiner must examine them on the merits, even though they include claims to independent or distinct inventions.

Even if the examiner were to provide rationale that the designated species were patentably distinct and an election requirement were proper under MPEP §808.02, it is respectfully submitted that the search and examination of all of the claims in the application can be made without serious burden to the examiner. Accordingly, it is respectfully submitted that, under MPEP §803, the examiner is required to examine all of the claims on the merits.

### **MPEP §808.01**

MPEP §808.01 states:

The particular reasons relied on by the examiner for holding that the inventions as claimed are either independent or distinct should be concisely

stated. A mere statement of conclusion is inadequate. The reasons upon which the conclusion is based should be given.

In the present application, the examiner has failed to meet the burden placed on him by MPEP §808.01. The examiner has merely set forth a listing of the species he has determined to be patentably distinct but has not provided any rationale for such determination. Accordingly, it is respectfully submitted that the election requirement is improper as set forth in MPEP §808.01.

### **Summary of Traversal Argument**

Therefore, it is respectfully submitted that the election requirement in the present application was improper. If such requirement were proper, the examiner has not met his burden in establishing such requirement. Accordingly, it is respectfully requested that such requirement be withdrawn, and the withdrawn claim reentered and examined on the merits.

### **Claim Amendments**

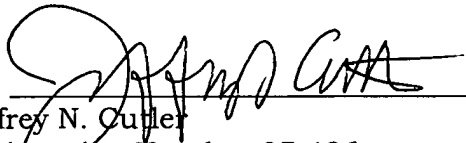
In reviewing the claims of the present application in response to the examiner's election/restriction requirement, it was noted that a typographical error was made in Claim 5. Accordingly Claim 5 has been amended to correct the error to read like Claim 21, element (b). Further, Claim 6 has been amended to correct a typographical error to depend from Claim 5, as opposed to Claim 6. It is respectfully submitted that such amendments are to correct the errors which were merely typographical in nature, and do not change the scope of the claims nor add subject matter to the application.

### **Summary**

In view of the election of Species II, including claims 1-51, the arguments for traversal of such election, and the amendment of Claims 5 and 6, it is believed that the above-identified patent application is in a condition for the issuance of a Notice of Allowance. Such action by the examiner is respectfully requested. If, however, the examiner is of the opinion that any of the drawings or other portions of the application are still not allowable, it will be appreciated if the examiner will telephone the undersigned to expedite the prosecution of the application.

Please charge any additional fees associated with this communication, or credit any overpayment, to Deposit Account No. 16-1910.

Respectfully submitted,  
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By   
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